United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

558

No. 22124

Roger Sinclair, Appellant

v.

United States of America, Appellee

Appeal from the United States District
Court for the District of Columbia

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INDEX

TABLE OF CASES

STATEMENT OF QUESTIONS PRESENTED

1. Whether the prosecution failed to present evidence tending to prove an essential element of one of the offenses charged, namely that Appellant carried a dangerous weapon without a license therefor, issued as provided by law.

2. Whether the on-the-scene identification by the complaining witness and subsequent events so tainted subsequent in-court identification as to constitute revenible error.

3. Whether the Court below erred in not ordering judgment of acquittal, at least sua sponte, at the close of all the evidence.

4. Whether the finding of guilty was contrary to the weight of the evidence.

This is an original appeal and has not previously been before this Court (General Rule 3(d) of this Court).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22124

Roger Sinclair, Appellant

v.

United States of America, Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from a judgment of the United States District Court for the District of Columbia (Walsh, J.) rendered on June 10, 1968, under the terms of which Appellant was convicted of robbery, carrying a dangerous weapon, and two counts of assault with a dangerous weapon and was sentenced to imprisonment for a period of three to nine years on the robbery count, one to three years on each

of the assault counts, and two to six years on the count for carrying a dangerous weapon, all to run concurrently. Leave to proceed on appeal in forma pauperis was granted by the District Court on June 26, 1968.

The District Court had jurisdiction under Sections 11-305 and 11-306 of the District of Columbia Code, and this Court has jurisdiction under Section 1291 of Title 28 of the United States Code.

STATEMENT OF THE CASE

By four-count indictment filed October 24, 1966, Appellant was charged with robbery, two counts of assault with a dangerous weapon, and carrying a dangerous weapon, in violation of Title 22 D.C.C. §2901, 502 and 3204. The robbery and assault counts also named one Benny Harley, not tried because of suicide before trial (Tr.23). Appellant pleaded not guilty on November 4, 1966. Tried by a jury before the Honorable Leonard P. Walsh on April 17, 1968, Appellant was convicted on all counts.

Government's Case-in-Chief

George Minor testified that in the early morning of August 26, 1966, he was walking down 14th Street N.W., in the District of Columbia, carrying a combination radio-record player, and at the corner

of 14th and N Streets, two men accosted him, one pointing a pistol, and the other holding a knife to his throat, demanding his radio. The corner was well-lit, he was standing five or six feet from a lamp post on the corner, and Appellant, who was holding the gun, was two or three feet from the witness. After a scuffle, the witness was struck on the back of the head, knocked to the ground, and the other two men ran down N Street toward 13th Street and Vermont Avenue, with the radio. A police car across the street responded to his call for help within four or five seconds. Mr. Minor further testified that he got into the police car, which went down N Street, turned left on Vermont Avenue, and meanwhile told the police officers only that he had been robbed with a knife and a gun. On Vermont Avenue, he saw Harley crouched behind a car, and observed one police officer arrest Harley, while the other police officer ran after the other man. He next saw the Appellant in the custody of the other police officer at the corner of 13th and N Streets N.W. and identified the Appellant at that time. He further made an in-court identification of the Appellant. He testified that he had seen the Appellant at the preliminary hearing and the day before trial in a hallway (Tr. 9-18).

On cross-examination, Mr. Minor testified that the two culprits ran in different directions, one going through an alley (Tr. 18); that un-

til the day before, he had not seen Appellant since the preliminary hearing in 1966; that Harley was arrested within about one minute (Tr.20).

On questioning by the Court, Mr. Minor testified that he could identify Appellant by his face; that the police cruiser was unmarked, and the police officers were in plain clothes (Tr.22).

Thomas F. Minogue, a police officer, testified that he was in a detective cruiser with another police officer across the street from the northeast corner of 14th and N Streets N.W., at about 4 or 4:30 A.M., and observed three men on that corner, of whom two knocked the third man down, one grabbing an object, and the two running east on N Street. The car came to the scene, and the man on the sidewalk told Mr. Minogue that he had just been robbed by the two men who were running; that man entered the cruiser and it proceeded after the two men (Tr.24,25). Turning the corner from N Street onto Vermont Avenue, Mr. Minogue testified that in the middle of the 1300 block of the Avenue, a walking man was observed, whom Mr. Minor identified as one of his assailants, and the police then arrested him, finding the radio and an open knife five or ten feet away from him at the time of the arrest. Mr. Minogue then testified that he crossed the street and observed another man crouched behind or alongside an automobile, who,

when aware that he had been seen, started running south on Vermont Avenue, then turned east on N Street, closely pursued by Mr. Minogue. That man stopped at a mailbox at 13th and N Streets, where the officer who was five or ten feet behind him (Tr.36) apprehended him, and in Court identified the man as the Appellant (Tr.32): Mr. Minor was then transported to the scene and identified the Appellant (Tr.34). Mr. Minogue further testified that, after arresting Appellant, a search of his person revealed a loaded small caliber revolver inside a "loafer" he was wearing on his right foot (Tr.32-34); and that the corner of 14th and N Streets was brightly lit by new fluorescent street lights.

On cross-examination, Mr. Minogue testified that he could not recall how Appellant was dressed, that apparently he had no description from the complainant, that he never lost sight of the man when he was running, and that after the arrest, Appellant refused to make any statement (Tr.36-38).

On examination by the Court, Mr. Minogue testified that he did not see Appellant stop or in any way put the revolver in his shoe while in pursuit (Tr.39).

The Government, on redirect examination, elicited Mr. Minogue's testimony that Appellant was first observed crouching on Vermont Avenue behind a car about three car-lengths away from where Mr. Minogue

was standing, and during the pursuit, maintained about the same distance between them (Tr.42).

The tesimony of two other police officers, Walter J. Franek and Clarence O. Smithea, was merely cumulative, in that each was in a police scout car parked about thirty yards from the scene of the robbery, saw a three-man altercation, with blows struck, and observed two of the men run down N Street. The witnesses' scout car reached Mr. Minor after the Minogue vehicle and reached 13th and N Streets after the Appellant, Sinclair, had been arrested (Tr.43-56).

Without objection, certification of the Metropolitan Police Department was read into the record, to the effect that Roger Sinclair had no license to carry a pistol in the District of Columbia on September 17, 1966 (Tr.56-57).

The Government then rested its case.

Defendant's motion for judgment of acquittal was denied. Defendant's counsel argued that such motion should have been granted because of "conflicting testimony between the complainant and police officers", and because the defendant was illegally apprehended and all resulting evidence should be suppressed. The Court advised Defendant's counsel that in view of the fact that no motion to suppress had been made since 1966, such motion will be denied (Tr.58-59).

Defense

Roger Sinclair then testified in his own behalf, to the effect that he had "picked up" a girl at 14th and T Streets (Tr.66), a prostitute named Linda Green (Tr.67), that he had walked her to the corner of 13th and N Streets N.W., where she left him (Tr.66), and has not been able to locate her since (Tr.67). While he was standing on the corner, a scout car came up, two police officers got out and ordered him to put his hands up. The detective scout car arrived, with the complaining witness, and the detectives asked the latter "Is this the gentleman?" The complaining witness said "I don't know." The patrol wagon then arrived and after being searched three times, they found a pistol in Appellant's shoe (Tr.66,67). Appellant further testified that he had been treated at D.C. General Hospital on August 15, 1966 for a gun-shot wound of the left thigh (Tr.67,68).

A stipulation was then read into the record repeating these facts, and adding that the bullet did not touch the bone, that Sinclair was ambulatory when he arrived, was released immediately after treatment and never returned for treatment (Tr.68,69).

On cross-examination, it was brought out that Appellant walked all the way from a 14th Street restaurant to the corner of 13th and N Streets N.W. with the gun in his shoe. To the question, "Do you have

a license to carry this gun?", Appellant replied "No, sir." (Tr.81,82) Appellant denied knowing Benny Harley personally, denied crouching behind a car on Vermont Avenue and being chased by Officer Minogue (Tr.82). Appellant stated that he saw the complaining witness first at the corner where he was arrested, and that the complaining witness, Benny Harley, and Appellant were in the same room at the precinct police station, where they had been brought (Tr.83).

On redirect examination, Appellant testified that he had purchased the pistol about four days before and always carried it in his shoe (Tr.84).

Government's Rebuttal

Officer Minogue was recalled and testified that the two assailants ran from the scene east into the 1300 block of N Street N.W., that after putting the victim into the police car, the car pursued the two men, and lost sight of them as they turned left on Vermont Avenue "for a few seconds" until the car reached the corner. He then saw one of the men on the east side of the 1300 block of Vermont Avenue and arrested him: crossing the street, he saw Appellant crouched behind a car about three car-lengths down, and when the latter saw him, the latter began running south on Vermont Avenue, pursued by Officer Minogue, and the running man then turned left and ran east in the 1300 block of N Street toward 13th Street. The witness denied ever losing

sight of him during the chase, being about three car-lengths behind, and caught up with the man when the latter stopped at the corner of 13th Street and N Street N.W., where the complaining witness identified him without hesitation, and there was no one else in the street. Upon searching Appellant, the witness found a revolver in his right shoe (Tr.88-90).

On cross-examination, Officer Minogue testified that at no time did Appellant bend over or stop to put anything in his shoe, during the time the officer was chasing him and until he stopped at the corner (Tr.91).

Defendant's Rebuttal

The Defense then recalled Appellant who testified that he was wearing an old pair of loafers, "flip-flops", that the back of the shoes were bent down from walking; he demonstrated how the pistol was placed in the back of the shoe, and then testified that the shoe would come off if he attempted to run rapidly (Tr.92,93).

STATUTES AND RULES INVOLVED

28 U.S. Code Sec. 2106:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court law-

fully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

22 D.C. Code Sec. 2901 (1967 ed.)

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

22 D.C. Code Sec. 502 (1967 ed.)

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years."

22 D.C. Code Sec. 3204:

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

Rule 29, Federal Rules of Criminal Procedure:

> "(a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

Rule 52(b), Federal Rules of Criminal Procedure"

> "PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

1. The prosecution failed to introduce evidence tending to prove an essential element of one of the offenses charged.

2. The trial court erred in failing to exclude the courtroom identification of the Accused by the complaining witness.

3. The evidence in the Court below was not sufficient to permit the case to go to the jury and the jury's verdict was contrary to the weight of the evidence.

SUMMARY OF ARGUMENT

I

The statutory crime of carrying a dangerous weapon without a license embraces two elements: (1) carrying a pistol (2) without a license, and both must be alleged and proved by the prosecution. Brown v. United States (Mun.App.D.C. 1949) 66 A. 2d 491. The Government failed to negative the possession of a license on the date of the crime, and thereby failed to prove an essential element of the crime charged. This defect was not cured by the Defendant's testimonial evidence.

II

After the complaining witness had identified the defendant at trial, counsel for the Government elicited testimony from the Defendant concerning a pre-trial confrontation between the witness and the accused at the police station immediately after the arrest. Such forced association unfairly reinforced a possibly mistaken original identification, in view of the circumstances of the original on-the-scene identification, and tainted all subsequent identifications by the complaining witness, in violation of Appellant's right to due process of law.

The trial court should have excluded the courtroom identification

when the Government failed to establish by clear and convincing evidence that the in-court identification was of an independent source.

III

At the close of all the evidence, the Court below should have ordered a judgment of acquittal at least sua sponte, on ground of insufficiency of the evidence, and not to do so was plain error, and the verdict was against the weight of the evidence in view of essentially uncorroborated identification testimony by the complaining witness, other gaps in the chain of events, and the physical impossibility that Defendant was the man pursued.

ARGUMENT

I. The Prosecution failed to introduce evidence tending to prove an essential element of one of the offenses charged.

The statutory crime of carrying a dangerous weapon without a license embraces two elements (1) carrying a pistol, (2) without a license, and both must be alleged and proved by the prosecution. The burden is on the prosecution to prove affirmatively that the defendant did not have a license. Brown v. United States (Mun.App.D.C.1949) 66 A. 2d 491.

The Government's evidence concerning the date of the crime

shows that it was committed on August 22, 1966 (Tr.9); and, concerning the license, shows that Roger Sinclair was not licensed to carry a pistol on September 17, 1966 (Tr.56,57). The Government thus failed to negative the possession of a license on the date of the crime, and thereby failed to prove an essential element of the crime charged.

This defect was not cured by Defendant's testimony. He was not asked whether he had a license to carry a pistol on the date of the crime, but only "Do you have a license to carry this gun?" (Tr.81,82). Defendant's reply, of course, was only referrable to the date of the trial, and irrelevant, so far as proving non-possession of a license on the date of the crime.

II. The trial court erred in failing to exclude the Courtroom Identification of the Accused.

Under the rule of Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967 (1967), since the pre-trial confrontation occurred before June 12, 1967, Appellant may show that such confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law, apart from any claim concerning right to counsel. Clemons v. United States, ___U.S.App.D.C.___, ___F.2d___(Nos.19,846, 21,001, 21,249, decided December 6, 1968).

There was testimony that the complaining witness identified the

Defendant at the scene of the arrest and also in the courtroom. The Appellant, on cross-examination, testified that he was placed in the same room with the complaining witness at the police station, after his arrest, for a length of time not stated (Tr.83). This period of forced association unfairly reinforced a prior identification made under doubtful circumstances, and tainted all subsequent identifications made by the complaining witness.

There is no evidence that the complaining witness ever gave a description of his assailants to the police, immediately after the crime (Tr.15,16,37). For all probative purposes, the testimony of police officers as to the Appellant was only that he was the man ultimately arrested. The complaining witness testified that his assailants, after the crime, ran off in different directions, one going down an alley (Tr.18). When he and the police cruiser pursued the running men, they were lost to view on rounding a corner (Tr.26,27,88); when Officer Minogue pursued a man he saw crouching behind a car, that man too was lost to sight on rounding a corner (Tr.30,31). There is no direct connection between either of the assailants and the Appellant. The flight of the man whom Officer Minogue was pursuing is more readily explicable as caused by fear at that hour of the morning than consciousness of guilt, since the police officer was in plain clothes,

the police cruiser was unmarked (Tr.22), and there is no evidence that the police officer ever identified himself to the running man. Appellant had none of the fruits of the crime on his person or nearby when arrested.

Indeed, there was no testimony whether Appellant when arrested was even breathing heavily, as if he had been running.

The complaining witness testified that he struggled with his assailants, even though he weighed only one hundred thirty-five pounds, a knife was held to his throat, he was at gunpoint, and "hollering for the police"(Tr.19,20). Under these circumstances, he could have caught only a fleeting glimpse of his attackers before they ran off into the darkness (Tr.20). Only one question was ever asked of the complaining witness as to how he could identify the Appellant in court, which elicited the answer that he remembered the Appellant's face (Tr.21). Nothing more.

All of the above circumstances cast substantial doubt on the validity of the first identification of the Appellant, particularly when coupled with evidence of the fact that Appellant had a short time before suffered a gunshot wound of one leg (Tr.68,69), the courtroom demonstration of how the pistol was carried in the Appellant's shoe, which precluded either running or retention of the weapon in the shoe (Tr.92, 93), and the testimony of the pursuing police officer that at no time did

the man pursued ever stop or bend over during the pursuit (Tr.91).

The probability of a mistaken identification was very great, and the identification by the complaining witness was essentially uncorroborated.

If there were any doubt in the mind of the complaing witness concerning his first identification at the scene of the arrest, it could have been dispelled by any period of association with the accused immediately afterward. There was no testimony concerning why the Appellant's face was so distinctive or memorable. And in view of all the gaps in other evidence, referred to above, the period of enforced association with Appellant at the police station, after the arrest, could, and Appellant submits, did so impress his facial features on the memory of the complaining witness that all subsequent identifications were made possible. These identifications thus were tainted and without independent basis, and the trial court erred in failing to exclude the courtroom identification of the accused, so that Appellant was denied due process of law.

III. The trial court erred in allowing the case to go to the jury, and the verdict was against the weight of the evidence.

At the close of all the evidence, the Court below should have ordered a judgment of acquittal on the counts involved, at least sua sponte, on ground of insufficiency of the evidence, and it was plain

error not to do so.

Appellant has discussed the deficiencies of evidence in Argument No. II hereof at some length. To have permitted the case to go to the jury at this stage of the proceedings would have required the jurors to indulge in more conjecture and speculation than the law allows, and Appellant submits that the quantum of evidence was clearly insufficient.

"The Court is also empowered under Rule 29(a) [of the Federal Rules of Criminal Procedure] to order an acquittal on its own motion." Moore, 8 Federal Practice §29.03[1].

CONCLUSION

Appellant respectfully submits that the judgment of conviction on all counts of the indictment of the United States District Court for the District of Columbia be reversed, inasmuch as said convictions were the product of insufficient proof of an essential element of one of the offenses charged, of insufficient evidence, and the judgments were contrary to the weight of the evidence.

Appellant further requests that the case be remanded to the District Court with a direction to enter judgment of acquittal, inasmuch as it does not appear that in the event of retrial, the evidence for the prosecution would be any stronger. Austin v. United States, 127 U.S.

App.D.C. 180, 382 F. 2d 129 (1967).

Or, in the alternative, Appellant respectfully requests that this case be remanded to the District Court for a new trial.

Respectfully Submitted,

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Counsel for Appellant
Appointed by this Court

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,124

ROGER SINCLAIR, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
D. WILLIAM SEGIN,
Assistant United States Attorneys.

Cr. No. 1225-67.

INDEX

TABLE OF CASES

OTHER REFERENCES

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* Cases chiefly relied upon are marked by an asterisk.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the trial court erred in failing to exclude the in-court identification testimony of the complaining witness?

II. Whether the trial court properly denied appellant's Motion for Judgment of Acquittal and whether there is sufficient evidence in the record to support the jury's verdict of guilty on each count of the indictment?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,124

ROGER SINCLAIR, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF AND APPENDIX FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on October 24, 1966, appellant Roger Sinclair and one Benny Harley were jointly charged in four counts with robbery, (22 D.C. Code § 2901) assault with a deadly weapon, (22 D.C. Code § 502) (one count charging use of a knife and one count charging use of a gun), and carrying a concealed deadly weapon (22 D.C. Code § 3204). The charges were abated as against the co-defendant Harley because of his death prior to trial.

On April 17, 1968 a trial was held in United States District Court, before Walsh, J. and a jury. A verdict of

guilty on all counts was returned, and on June 7, 1968 appellant received a sentence by the trial court of three to nine years on count one; one to three years each on counts two and three and two to six years on count four, the latter three sentences to run concurrently with the sentence imposed under count one.

The Trial Proceedings

The victim of the crime, one George E. Minor, twenty-one years old at the time he testified for the Government, related the details of the incident which took place on August 26, 1966. (Tr. 9) He stated that he was walking down 14th Street, N.W., in the District of Columbia, in the early morning of that date, on his way home from a party, and he was carrying with him his radio-record player combination. (Tr. 9, 10)

When he reached the intersection of 14th and "N" Streets, N.W. he saw two men coming out of the alley. As he described the subsequent events:

> "Then one of them walked up in front of me. He had a gun under his shirt. He told me he wanted the radio. So I said something. Then the other one slipped up behind me and put a knife to my neck. So they started to scuffle then and knocked me to the ground, and they grabbed the radio and ran down 'N' Street." (Tr. 10).

The witness then identified appellant in court as the man with the gun. (Tr. 11) The victim identified the gun which was introduced into evidence, and stated that at one point appellant had pointed the barrel at him. (Tr. 12) He indicated that appellant was but two or three feet away from him when the robbery took place. He described the corner as being "well lit" because of the proximity of the lamp post dome five to six feet away from the encounter. (Tr. 13)

Mr. Minor further testified that the co-defendant Harley had told appellant Sinclair to shoot the victim, and tried himself to get Minor's wallet from his pocket. In the struggle, Harley struck the victim on the back of

the neck and knocked him to the ground. (Tr. 13-14) Then both assailants fled with the radio down "N" Street towards 13th and Vermont Avenue. (Tr. 15) The victim yelled for the police as the men ran off.

The police responded in just four or five seconds, since some officers were just across the street at the time. (Tr. 15) The complainant told them of the robbery and then went with them in the car down "N" Street to Vermont Avenue where they made a left turn and apprehended the co-defendant Harley crouched behind a car. (Tr. 15-16) About half a block further on, appellant was taken into custody, at 13th and "N" Streets, N.W. The witness Minor identified appellant at the time of the apprehension and again in court, stating on that latter occasion, that he was positive that appellant was the man who held him up with the gun on the night of the crime. (Tr. 17-18) Upon questioning by the Court the victim testified that he identified appellant because, "I can remember his face", and "[h]e was standing directly in front of me" (at the time he was robbed.) (Tr. 21).

Private Thomas F. Minogue of the Metropolitan Washington Police Force, Second Precinct, was the next to testify. (Tr. 23) He was assigned to the detective cruiser with Detective Manaco (since retired) on that occasion, and recalled being at 14th and "N" Streets at about 4:00 or 4:30 in the morning of August 26, 1966. (Tr. 24) He described the corner as being lit with "new fluorescent lights." (Tr. 34) While stopped at the stop sign at that intersection, he stated that he and his partner observed:

> "* * * over on the northeast corner three males standing on the corner. Two of the males knocked one of them down and one of them reached down and grabbed an object and started running east in the thirteen hundred block of "N" Street, N.W." (Tr. 25).

At that point the police went through the intersection, picked up the complainant and pursued the subjects who

had fled on foot. (Tr. 25) They proceeded in the police cruiser heading in the same direction as the suspects, and apprehended one of them in the middle of the thirteen hundred block of "N" Street. (Tr. 27-28) They observed a record player that the complainant identified as his, about five or ten feet from the captured suspect, and an open knife in a "tree box space" about four or five feet away from him. (Tr. 28).

After recovery of the above items, Detective Manaco held the one subject, while Officer Minogue looked south down the thirteen hundred block of Vermont Avenue for the second suspect. He spotted the second man "* * * crouched down behind, alongside an automobile. When he saw me," the officer continued, "he started running south in the thirteen hundred block of Vermont Avenue" away from the police. (Tr. 30) Private Minogue followed the subject on foot to Vermont and "N" Streets and then east to 13th and "N" Streets, whereupon "a police car came through the twelve hundred block of 'N' Street." As the officer approached, he saw the suspect stop and lean against a mailbox on the corner. (Tr. 39) With the help of the other police from the patrol car, he placed the man under arrest. (Tr. 31) He identified appellant as the suspect apprehended at that time. (Tr. 32)

Before putting the appellant in the patrol wagon which arrived soon thereafter, Officer Minogue testified that he searched the suspect. When he noticed the appellant's right foot would not go down into the loafer he was wearing, he asked him to take his foot out of it, and there, inside the loafer, the officer found a small caliber revolver. (Tr. 32) There were seven live rounds in the chamber at the time it was discovered. (Tr. 34) Then Detective Manaco responded to the scene with the complaining witness, who identified appellant as being the second robber. (Tr. 34) Officer Minogue was positive at the trial that appellant was the same man whom he saw cross behind the car whom he apprehended at the end of the chase at 13th and "N" Streets. (Tr. 42)

Private Walter J. Franek also of the Second Precinct, Metropolitan Police, was the next to testify. (Tr. 43) He and his partner were parked in a marked police squad car on the southwest corner of 14th and "N" Streets, N.W. at about 4:00 or 4:30 a.m. on August 26, 1966 when they observed "* * * three Negro males struggling on the northeast corner * * *" of the same intersection. (Tr. 44, 45) While they were parked about 30 to 35 yards away, they heard one of the subjects yell "'Help police.'" (Tr. 44) The officers immediately drove across the street, and saw two of the men take off running. (Tr. 44) They learned that the third man who was lying on the ground had just been robbed, (Tr. 45) and they continued pursuit of the two fleeing subjects. Finally they apprehended one of the suspects at the corner of 13th and "N" Streets, and Officer Franek identified appellant at the trial as being that person whom they apprehended. (Tr. 46)

Private Clarence O. Smithea of the Second Precinct police was Private Franek's partner on the morning of this robbery, and he testified substantially the same as his partner, except that he could not recognize anyone as the man they apprehended at that time. (Tr. 51) He substantiated the short chase from the scene of the crime at 14th and "N" Streets to the apprehension of the second suspect at 13th and "N" Streets, however. (Tr. 55)

Thereupon, the Government introduced, without objection, a certificate of the Metropolitan Police Department, signed by Howard E. Covell, who, if called to testify, would have testified that appellant Roger Sinclair did not have a license to carry a pistol in the District of Columbia.[1]

The Government thereupon rested its case.

A Motion for Judgment of Acquittal was made and denied. (Tr. 58-59). Out of the presence of the jury the Government indicated its intention to use appellant's

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[1] The text as read into the record appears in the Appendix, *infra*.

prior conviction in 1961 for robbery for purposes of impeachment if he chose to testify. The Court ruled that such a conviction could not be used under the *Luck* and *Gordon* decisions. (Tr. 60-61)

The appellant Roger Sinclair took the stand on his own behalf and testified that he was at 13th and "N" Streets when apprehended, because he had walked a girl home from a place called "The Spa", which was located at 14th and "T" Streets. (Tr. 66)

Appellant claimed that girl was a prostitute and he had not been able to locate her since the date of the offense. (Tr. 67)

He also alleged that when the complaining witness was brought to the place where appellant was apprehended that the witness said he did not know if appellant was the robber. (Tr. 66) Appellant further stated that the police searched him three times before placing him in the patrol wagon, and it was not until the third time that they found the revolver in his shoe. (Tr. 67) He did acknowledge, however, on cross-examination, that he was in fact carrying a loaded gun in his shoe when he was caught, and that he did not possess a license for the pistol. (Tr. 81-82)

Appellant also tried to show by way of defense, that he had suffered a gunshot wound in the leg some eleven days earlier. (Tr. 67) A stipulation did reveal that he had received such a wound, for which he received Emergency Room Treatment at D.C. General Hospital on August 15, 1966. But it was also shown that "* * * the bullet wound did not touch the bone of the leg; [that] * * * the defendant was ambulatory when he arrived at the hospital, that is, he was capable of walking; [and] * * * Roger Sinclair was released immediately following treatment." (Tr. 68) There was no testimony that appellant was rendered incapable of walking. In fact the stipulation further revealed "* * * that Roger Sinclair never returned to Washington Hospital Center for any further treatment in connection with this gunshot wound." (Tr. 69) Appellant denied his guilt of the crimes charged. (Tr. 76)

Cross-examination of appellant revealed that he had been employed as a porter, but was not working the week of the crime. (Tr. 76-77). He reiterated that he had been to the place called "The Spa" with the girl whom he had not seen since, and he stayed there with her until it closed at 2:00 a.m. (Tr. 77) When asked where he went after that, he responded that he took her to 13th and "N" where he left her. (Tr. 78) He said he spent about five minutes talking with her on the corner. (Tr. 79) When he was confronted with the discrepancy in time, from approximately 2 a.m. until his apprehension sometime after 4:00 a.m. at 13th and "N" Streets, appellant then stated that he had taken the girl to a place called "Wings 'N Things" to eat, for about two hours before going to 13th and "N". (Tr. 79-81) He stated that he was carrying the loaded revolver in his shoe the whole time he was walking that distance. (Tr. 81) He denied having taken part in the robbery or having been chased by the officers. (Tr. 82-83) He stated on redirect that he had possessed the gun for about four days, always carrying it in his shoe, for his own protection, because as he explained, "* * * I got shot before in a crap game." (Tr. 84) He admitted not having a license for it. (Tr. 81-82).

Officer Minogue was recalled and reiterated substantially his former testimony. (Tr. 87-90) On cross-examination he indicated appellant did not stop except at the corner, just before his apprehension, when the officer saw him lean against a mailbox, and lift up his leg, but the officer was not in a position to observe what he did at that time. (Tr. 91)

Appellant returned to the stand to try to demonstrate how he carried the gun in his shoe on the day of the offense, and alleged that the loafers he wore then were so worn down in the backs as to make it difficult to run at a rapid rate of speed in them, and keep the gun in the shoe as well. (Tr. 92-93)

Following closing remarks and instructions, the jury deliberated, returning a verdict of guilty on all four

counts in the indictment as stated previously. This appeal was taken from that conviction.

ARGUMENT

I. The trial court did not err in failing to exclude the in-court identification testimony of the complaining witness.

Appellant contends that the in-court identification of him by the complaining witness, George E. Minor, should have been excluded because it was allegedly tainted by an on-the-scene identification on the street shortly after the robbery, and again later that night by a purported confrontation in a room with some other persons at the Precinct Station. (App. brief, 14-15). It is the Government's position that the in-court identification was properly admitted because it was established "* * * by clear and convincing evidence that the in-court identification was based upon observations of the suspect other than the [allegedly illegal] * * * identification." *United States* v. *Wade*, 388 U.S. 218, 240 (1967).

The "independent source" of the in-court identification consisted of the observations made by complainant at the scene of the crime, and thus, there is little possibility that any subsequent confrontations, however suggestive, could possibly give rise to a "very substantial likelihood of irreparable misidentification." [2]

At the scene of the crime, appellant had ample opportunity to observe appellant's facial characteristics, inasmuch as appellant walked up to the complainant and stood in front of him, just two or three feet away from him, with nothing at all covering his face. (Tr. 13). As previously indicated, the area was well lit, since the flourescent lamp post was only five or six feet away from where they stood facing each other. (Tr. 13, 34).

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[2] *Clemons* v. *United States*, —— U.S. App. D.C. ——, 408 F.2d 1230, 1250 (1968), *cert. denied*, 394 U.S. 964 (1969); *Simmons* v. *United States*, 390 U.S. 377, 384 (1968); *Bryant* v. *United States*, D.C. Cir. No. 21,863, decided August 7, 1969, slip op. at 4.

The complainant was able to observe appellant as he held him up with the gun, and as they struggled together, so there is factual support for his statement in record that he remembered appellant's face. (Tr. 17, 18, 21)

Furthermore, appellant's observations and subsequent identification, were corroborated by testimony of the officers who actually observed the crime take place, and by the totality of the surrounding circumstances, including the finding of the co-defendant with the stolen property and the knife, and the quick pursuit and capture of appellant who was found with the gun described by the complaining witness. Officer Minogue testified that at most he lost sight of appellant for a few seconds when they turned a corner, but they caught appellant at 13th and "N" Streets within minutes of the robbery at 14th and "N" Streets (Tr. 88-89) Following the chase, the complaining witness was brought to the place of the arrest where he identified appellant at that time, (Tr. 17) and according to the officer, the witness did not hesitate at all in making the identification. (Tr. 90) Such a confrontation was proper, and the evidence was permissible in court, for it lacked the capacity to taint the in-court identification, and was inherently reliable because of the close proximity in time which the event bore to the offense itself. "[T]his fresh on-the-scene identification, made immediately after the robbery, was admissible under [this Court's] holding in *Wise* v. *United States*, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967), *cert. denied*, 390 U.S. 964 (1968). *See also Bates* v. *United States*, —— U.S. App. D.C. ——, 405 F.2d 1104 (decided December 13, 1968)." *Young* v. *United States*, —— U.S. App. D.C. ——, 407 F.2d 720, 721 (1969).

There was no basis for implying any unfairness in the manner in which appellant was identified on the street almost immediately after the apprehension, and proximate to the crime. Such a prompt confrontation not only assures reliability but promotes fairness, by per-

mitting expeditious release of innocent suspects, and in this case the procedure violated no element of due process. See *Russell* v. *United States*, —— U.S. App. D.C. ——, 408 F.2d 1280 (1969); *cf. Stovall* v. *Denno*, 388 U.S. 293 (1967).

Furthermore appellant's bare contention, asserted but once in the record, in a remark by appellant himself, that he was in the same room with complainant in the Second Precinct station on the night of the crime,[3] could not, even if true, have the capacity to unfairly taint his in-court identification of appellant. He did not state that the complainant actually saw him or identified him on that occasion, and the complainant said he had not seen appellant from the time of the on-the-scene confrontation until the preliminary hearing. (Tr. 17, 21) Furthermore, there was never any objection raised at trial to the identification by the complaining witness in court. But even assuming any impropriety, the in-court identification clearly had an independent source, and its admission in evidence was not error. (See *Clemons, supra.*)

II. The trial court properly denied appellant's Motion for Judgment of Acquittal, and there was sufficient evidence in the record to support the jury's verdict of guilty on each count of the indictment.

Appellant argues that the trial court erred in not ordering a judgment of acquittal *sua sponte* at the close of the entire case. (App. brief at 17-18). Appellant had

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[3] Appellant was questioned concerning the complaining witness as follows:

"Q. How long did you look at him on that night? How long did the complaining witness look at you and how long did you look at him?

A. Well, when they took us down to Number 2 we was in the same room.

Q. Did you see Mr. Benny Harley on that night?

A. Yes, sir.

Q. He was transported to the precinct with you?

A. All three of us was in the same room." (Tr. 83).

made a Motion for Judgment of Acquittal at the end of the Government's case. (Tr. 58-59) The facts presented in the Counterstatement of the Case, *supra*, indicate that there was clearly sufficient evidence, viewing the case in the light most favorable to the Government, to allow the case to go to the jury. *See Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947). Certainly, the jury could well have concluded that appellant's story was incredible, and that the testimony of the complaining witness, together with the corroboration provided by the police officers who were eye witnesses to the crime, plus the finding of a loaded pistol on appellant's person when apprehended, were sufficient to convince a reasonable mind that appellant was guilty beyond a reasonable doubt.[4]

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[4] Appellant also raises the point (App. brief at 13-14) that the evidence on count four (carrying a deadly weapon) was insufficient to go to the jury because the evidence was that appellant did not possess a license for the gun on the day of trial, nor on September 17, 1966, nor on October 27, 1966, which was the date when the search of the Police Records was made, but that such proof did not establish that on August 26, 1966, the date of the offense, appellant had no license for his pistol. He contends that appellant's admission when he testified at trial should be confined to an expression that he had no license on the date of trial. He was asked, "Do you have a license to carry this gun?" to which he replied, "No, sir." (Tr. 81-82). It can be inferred from his answer, plus the wording of the certificate introduced in evidence (*see Appendix, infra*), that the records reveal appellant did not ever have a license and there is no showing that he possessed a license and then lost it or that it was revoked for some reason. Absent some showing that appellant at one time did have a license, we submit that there is some justification for the jury drawing an inference from the proof that he did not have a license on the day in question. But the Government suggests that this question need not be decided by the Court in this case, for appellant received a sentence of two to six years on this count four, to run *concurrently* (along with counts two and three) with the sentence of three to nine years imposed on count one. *See, Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105 (1943) which at the least, still may have some continuing legal validity as a rule of "judicial convenience," (*Benton* v. *Maryland*, 37 U.S.L.W. 4623, 4624-6, (decided June 23, 1969)) and should be applied here.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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JOHN A. TERRY,
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Assistant United States Attorneys.

APPENDIX

"This is to certify that the records of the Metropolitan Police Department relating to the issuance of licenses to carry a pistol are in his custody and control pursuant to the above quoted directive of the Chief of Police dated January 5th, 1966, of which I certify is a true and accurate copy, that a diligent search has been made of those records for information concerning the following described person, the date of that search being October 27th, 1966, and the person being named as Roger Sinclair, 924 Q Street, N.W.; Sex-male; Race-Negro; Age 23; and according to the records of this Department the above-named person did not have on September 17th 1966, a license to carry a pistol in the District of Columbia, nor does he now have such a license." (Tr. 56-57)

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